

No. 89-1020

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Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1989

ANDONIS MORFESIS,

Petitioner,

v.

DEPARTMENT OF HOUSING PRESERVATION AND
DEVELOPMENT OF THE CITY OF NEW YORK,

Respondent.

On Petition For A Writ Of Certiorari To The
New York Supreme Court, Appellate
Division, First Department

REPLY BRIEF FOR PETITIONER

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Although in the argument portion of its brief Respondent does not contend that Petitioner waived his jurisdictional claims, in its "Counter-Statement of the Case" Respondent makes a number of allusions to a purported waiver. Respondent's brief also indicates that Petitioner had "actual notice" of the contempt proceedings, and appeared and defended by counsel. This reply addresses only those assertions.

1. Respondent maintains that under New York Civil Practice Law and Rules ["CPLR"] § 3211(e) Petitioner waived objections to personal jurisdiction in six of the seven contempt proceedings based on his failure timely to assert them by written answer or motion. (Brief in Opposition at 6)

In the proceedings referred to, no written notice of appearance, answer or motion to dismiss pursuant to CPLR § 3211 was served or filed. Rather, on the return date of the orders to show cause, counsel appeared in the Housing Part ostensibly on behalf of all the respondents, and the matter was set down for trial. Respondent Department of Housing Preservation and Development of the City of New York ("HPD") neither contested this procedure nor sought a default judgment based on any failure to serve and file responsive papers. At the contempt trials, counsel moved orally to dismiss for lack of personal jurisdiction. The court fully addressed the motion on the merits and denied it. In its post-trial opinion, the court raised *sua sponte* the question of waiver, but determined that, "although no formal answer was served," New York caselaw "probably permits it to be raised even though not pleaded." (App. 15) On Petitioner's appeal to the Appellate Term, HPD did not contend that his jurisdictional claim had been waived by failure to assert it in a responsive pleading, and the Appellate Term fully addressed the claim on the merits. Thus, the New York courts found no waiver of Petitioner's jurisdictional claim.

2. Petitioner disputes that he "appeared" in the contempt proceedings since, under New York law, "the defendant appears by serving an answer or a notice of

appearance or by making a motion which has the effect of extending the time to answer," CPLR § 320(a), and no such answer, notice or motion was served here. Even if the attorney's appearance in court satisfied CPLR § 320, there is no indication that the attorney who appeared on behalf of all the respondents, including corporate ones, was expressly or implicitly authorized to appear on behalf of Petitioner personally. See *Skyline Agency, Inc. v. Coppotelli*, 117 A.D.2d 135, 502 N.Y.S.2d 479 (2d Dept. 1986) (where defendant was never personally served with process and neither expressly nor implicitly conferred authority on attorney who appeared on behalf of all defendants, jurisdiction was lacking).

It is true, as Respondent states, that counsel appeared on behalf of Petitioner personally at the sentencing hearing. But, first, this was *after* Petitioner had been adjudicated in civil and criminal contempt and after the court had stated, in its written opinions, that a jail sentence would be imposed. (App. 18, 23, 29) Second, at the sentencing hearing counsel appeared solely to make an application for a four-week adjournment so that Petitioner could complete arrangements for retaining an attorney experienced in criminal matters to represent him, in light of the imminent sentences of incarceration, and appeared without Petitioner because of prospective counsel's concern that Petitioner's personal appearance might waive his jurisdictional challenge. (Transcript of Sentencing Hearing at 11-14.)

3. Nowhere in the record, prior to the sentencing hearing, is there any indication that Petitioner had "actual notice" of the contempt proceedings.

For these reasons, and those stated in the petition, a writ of certiorari should be granted.

Dated: New York, New York
January 30, 1990

Respectfully submitted,

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